NO. 324

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

NORFOLK AND WESTERN RAILWAY COMPANY and WABASH RAILROAD COMPANY,

Appellants,

vs.

MISSOURI STATE TAX COMMISSION; Hunter Phillips; Howard J. Love; J. Ralph Hutchinson, Members of the Missouri State Tax Commission, and J. R. Towson, Secretary of the Missouri State Tax Commission.

Appellees.

On Appeal from the Supreme Court of Missouri.

MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM.

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MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM.

Appellees in the above-entitled cause move to dismiss this appeal or, in the alternative, to affirm the decision of the Supreme Court of Missouri, on the grounds that the questions presented are so unsubstantial as not to need further argument.

OPINIONS BELOW.

The Findings of Fact, Conclusions of Law and Decision of the State Tax Commission were included in the opinion of the Supreme Court of Missouri, which is not yet reported because of the pendency of this appeal. This opinion was printed as Appendix B to appellants' Jurisdictional Statement. The Circuit Court of Cole County did not render a

formal opinion but entered a Judgment and Order affirming the findings of the State Tax Commission.

JURISDICTION.

This proceeding was initiated by appellants before the State Tax Commission of Missouri challenging the assessment on its rolling stock for ad valorem taxes on the ground that the assessment resulted in the taxation of property not properly taxable by the State of Missouri in contravention of the Constitution of the United States, in that it lay an undue burden upon or discriminated against interstate commerce in violation of the commerce clause, Article I, Section 8, and deprives them of property without due process of law in violation of the Fourteenth Amendment.

The assessment was affirmed by the Commission on rehearing and the decision of the Commission was upheld by the Circuit Court of Cole County and subsequently the Supreme Court of Missouri upon appeal. Although appellants do not challenge the constitutionality of the assessing Missouri statute per se, they base their appeal on the provisions of 28 U.S.C. Section 1257(2) which allow an appeal "where is drawn in question the validity of a statute of any state on the grounds of its being repugnant to the Constitution, * * * of the United States, and the decision is in favor of its validity."

QUESTIONS PRESENTED.

This case involves the validity of an assessment made by the Missouri State Tax Commission in accordance with Section 151.060, Revised Statutes of Missouri, which prescribes a formula for assessing the rolling stock of interstate railroads for the purposes of ad valorem taxation. This formula, sometimes called the mileage or trackage formula, apportions to Missouri that portion of the entire value of all of the rolling stock of such railroads on the ratio

of miles of road operated in Missouri to the railroads' total road mileage. On October 16, 1964, appellant, Norfolk & Western, became lessee of all of the properties of appellant, Wabash, which had tracks and operations in Missouri which Norfolk theretofore had not. For the following year, as of January 1, 1965, an assessment was made against Norfolk and Western by applying to the value of the entire N & W fleet, owned and leased, the ratio of the leased mileage in Missouri to the total Norfolk & Western mileage.

The questions presented are these:

1. Whether the Supreme Court of Missouri erred in holding that appellants' evidence presented at a hearing before the Missouri State Tax Commission, was not sufficient to overturn the assessment made by the Commission in accordance with Section 151.060, RSMo, against appellants' allegations that such assessment resulted in the placing of a valuation upon the property of N & W greatly in excess of the value of such property actually in Missouri on the tax day in violation of the commerce clause, Article I, Section 8 of the Constitution of the United States or the due process clause of the Fourteenth Amendment thereto.

STATEMENT.

The State Tax Commission of Missouri has the exclusive power of original assessment of railroads, railroads cars and rolling stock, Section 138.420 (1).* Section 151.010 subjects to taxation by the State of Missouri "* * * all real property, erty, owned, hired or **leased** by any railroad company or corporation in this state, * * *", "In assessing, adjusting and equalizing any railroad property . . . the state tax commission may arrive at its finding, conclusion and judgment, upon its knowledge or such information as may be before it,

*All statutory references herein, unless otherwise designated refer to the Revised Statutes of Missouri, 1959, and Vernon's Annotated Missouri Statutes, V.A.M.S.

and shall not be governed in its findings, conclusions and judgment by the testimony which may be adduced, further than to give to it such weight as the commission may think it is entitled to; provided, that when any railroad shall extend beyond the limits of this state and into another state in which a tax is levied and paid on the rolling stock of such road, then the said commission shall assess, equalize and adjust only such proportion of the total value of all the rolling stock of such railroad company as the number of miles of such road in this state bears to the total length of the road as owned or controlled by such company."

Appellants, Wabash Railroad Company and Norfolk and Western Railway Company, entered into a lease effective October 16, 1964, whereby N & W leased all of the properties of Wabash under a long term lease. As part of the payment due under the lease, N & W is to pay all taxes on the leased property. Prior to the lease, N & W had no tracks in Missouri and did not operate in this state.

Thereafter, pursuant to statute and using the statements required to be furnished by all affected railroads, the Commission notified N & W that its assessment for 1965 taxes in its properties was $31,298,939. This amount includes an assessed value for roadbeds in the amount of $11,677,875, for buildings in the amount of $499,722 and for rolling stock in the amount of $19,981,757 less $860,415, which is deducted by the Commission as an economic factor, which factor is allowed all railroads in varying amounts.

This assessment was made against N & W as lessee of the property being assessed. No assessment was made against Wabash.

The assessment of the rolling stock leased by N & W was made in accordance with Section 151.060 (3), in that the Commission determined the assessed value of the entire

rolling stock of N & W wherever situated to be in the amount of $513,309,877. This was arrived at as in all other railroad assessments made by the Commission by taking the original cost of the equipment by the year of acquisition and allowing five percent depreciation per year but with a maximum depreciation of seventy-five percent of the original cost. Thereafter, as in the case of all railroad assessments for the year 1965, a factor of forty-seven percent was applied by the Commission, resulting, in the figure of $241,255,643.

The Commission then determined that 8.2824 percent of all the main and branch line tracks owned or leased everywhere by N & W, were leased, owned or controlled by N & W in Missouri. This percentage of the depreciated and equalized value of the entire amount of N & W's rolling stock was determined to be $19,981,757.

No question has been raised concerning the valuation placed upon the leased roadbeds or buildings. Nor do appellants question the total valuation placed upon the rolling stock of N & W, wherever located, the method of depreciation and equalization nor the trackage percentage used to apportion the rolling stock.

The only question raised is whether under special circumstances allegedly present in this case, the valuation determined by the statutory formula fairly reflected that portion of N & W's rolling stock subject to taxation in this state.

At the hearing before the Commission appellants presented evidence tending to show that a large portion of the now rolling stock, consisting of expensive equipment used for its coal hauling operations in the eastern portion of the country did not enter the State of Missouri and acquired no situs in this state. Using the mileage apportionment formula under these circumstances, it was contended, constitutes

taxation of property not within the state's jurisdiction and in violation of the due process amendment and commerce clause in the Federal Constitution.

The Commission found against appellants, holding among other things, that "the evidence adduced by appellants does not show that the valuation placed upon the rolling stock of petitioner was grossly excessive nor that such assessment resulted in an unlawful or unconstitutional taxation of any property of petitioner, nor does the evidence adduced by the petitioner show that in applying the formula herein indicated that the Commissioner acted in an unlawful, improper, arbitrary or capricious manner" (Page 11a, Jurisdictional Statement).

The Commission's Findings were affirmed upon appeal by the Circuit Court of Cole County and again by the Supreme Court of Missouri.

ARGUMENT.

The resolution of the questions presented by this appeal does not involve any new principles of law nor a departure from any established principles. It concerns only the application of recognized legal concepts to a set of facts peculiar to the appellants herein and its solution will apply to no one other than the appealing parties.

It is undisputed that the rolling stock leased by N & W was correctly assessed in accordance with the formula prescribed by Section 151.060(3). Appellants do not attack the constitutionality of the formula or the statute per se, but contend that because of special circumstances peculiar to the operations of N & W and its relationship with Wabash, the application of the formula to N & W is violative of the Federal Constitution.

"The problem [using any apportionment formula] under the Commerce Clause is to determine 'what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions.' So far as due process is concerned the only question is whether the tax in practical operation has relation to the opportunities, benefits or protection conferred or afforded by the taxing State. Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the State." **Ott v. Mississippi Valley Barge Line Co.**, 336 U.S. 169 (1949).

The mileage formula used by Missouri has long been found to be an appropriate and constitutional method of apportionment when the result is fair. **Pullman's Palace Car Co. v. Pennsylvania**, 141 U.S. 18 (1891); **Central Railroad Company of Pennsylvania v. Pennsylvania**, 370 U.S. 607 (1962); **Braniff Airways, Inc. v. Nebraska State Board**, 347 U.S. 590 (1954); **Ott v. Mississippi Valley Barge Line Co.**, supra.

Appellants have contended that this formula as applied to N & W is not fair and violative of the requirements of the commerce clause and of due process because of the peculiar nature of its operations. They presented evidence tending to show that the lease of the Wabash system did not change the fundamentally different operation of the two railroads; that before and after the lease, Wabash operated as a carrier of general merchandise between Missouri and Iowa and the east, while a large portion of the operations of N & W consist of transporting coal throughout the eastern portion of the United States, using more expensive equipment most of which never came into Missouri. The gist of their argument is contained in Exhibit 25 wherein appellants determined the average actual value of the rolling stock present in Missouri during 1965 to be $7,014,723.

The use of the method of apportionment advanced by appellants, commonly known as the "average number of units in a state formula," has been held to be a fair method of apportionment of interstate rolling stock. **Central Railroad Company v. Pennsylvania,** supra. However Missouri does not use this method of apportionment, **St. Louis Southwestern Railway Co. v. State Tax Commission,** Mo.Sup., 319 S.W.2d 559 (1959), and the figures thus obtained are not conclusive on whether the N & W assessment for 1965 based upon a mileage apportionment is unconstitutional.

The average number of units formula which considers only the value of those units actually in the taxing state, does not take into account any enhancement of the value of such units resulting from their use through an entire system. It has been repeatedly recognized that an appropriate and constitutional method of assessment of an interstate railroad is to determine the value of the entire system, as a homogenous unit representing a single profit-earning business and then to assign a percentage of that valuation ac-

cording to some fair and reasonable method of apportionment. **51 Am.Jur., Taxation Section 877; 84 C.J.S. Taxation, Section 426(c).** The mileage formula is an approved method of making such an apportionment of the valuation of an entire system.

When, as here, the rolling stock of a railroad is part of a system and has an augmented value by reason of a connected operation of the whole, it may be taxed according to its value as part of the whole system, although the other parts be outside the state. In other words, the tax may be made to cover the enhanced value which comes to the property in the state through its organic relationship to the system. **Pullman Co. v. Richardson,** 261 U.S. 330 (1923). Valuation and apportionment of the entire system does not impose a tax upon outstate property of interstate railroads, but undertakes to tax only the allocable portion of the rolling stock of such railroads wherever operated, and the value of such stock operating exclusively outside the state is taken into account solely and only for the purpose of arriving at a just valuation of that operating within. **Adams Express Co. v. Ohio State Auditor,** 165 U.S. 194 (1897).

As this Court said in **Union Tank Line Co. v. Wright,** 249 U.S. 275 (1919), l.c. 282: "While the valuation must be just it need not be limited to the mere worth of the articles considered, separately but may include as well 'the intangible value of what we have called the organic relation of the property in the State to the whole system.' " See also **Railway Express Agency, Inc. v. Virginia,** 358 U.S. 434, (1959) and **Cudahy Packing Co. v. Minnesota,** 246 U.S. 450 (1918).

The method of apportionment relied on by appellants to prove the assessment made by the Commission was constitutionally excessive, does not take into account the increased value of the rolling stock, formerly of Wabash now operated

as a part of the N & W system, and by its use appellants seek to substitute a unit value method of apportionment which disregards a legitimate enhancement of value repeatedly approved by this Court against similar constitutional attacks.

Appellants place great reliance on the fact that the assessed value of the rolling stock leased by N. & W in this state was found to be over $19,000,000, whereas the rolling stock of Wabash taxable in this state had been assessed at approximately $10,000,000 on January 1, 1964. This increase of course was due to the greater valuation of the rolling stock of the entire Norfolk and Western line. Appellants contend that since the average number of units used in Missouri did not change appreciably, the valuation of the rolling stock could not be changed because of its being leased to Norfolk & Western.

However a similar situation occurred in the case of **Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co. v. Backus**, 154 U.S. 421 (1894) wherein the complaining railroad was created between April 1, 1890 and April 12, 1891, by a consolidation of several existing corporations: By virtue of the consolidation and a new act changing the method of apportionment, the assessed value property of the railroad in Indiana was increased from $8,538,053 to $22,666,470. As in this case, the railroad produced numerous exhibits showing that the value of the units actually operating in Indiana had not changed.

This Court ruled against the railroad saying that a mere increase in the assessment does not prove the assessment wrong and the testimony regarding the valuation of the individual units was not sufficient to prove the assessment by use of the mileage formula illegal and excessive. No evidence other than that of the railroad was presented to the Com-

mission except the testimony of the Secretary of State that in assessing the railroads property, no assessment was made except on the railroad track and rolling stock of the railroad within the state, and no assessment was made of any property of value outside the state. This statement, which was a legal conclusion of the question to be determined and thus of little, if any value, was the only difference in the facts between that case and this.

Consistently, throughout their Jurisdictional Statement, appellants have stated that the Commission acted in blind obedience to a mechanical application of the mileage formula. This is in error. The original assessment, of course, was determined by use of the prescribed formula. The burden of showing this assessment to be excessive was then placed upon appellants. **State ex rel Platz v. State Tax Commission**, Mo.Sup. 384 S.W.2d 565 (1964); **Cupples Hesse Corp. v. State Tax Commission**, Mo.Sup. 329 S.W.2d 696 (1959); **May Department Stores Co. v. State Tax Commission**, Mo.Sup. 308 S.W.2d 748 (1958).

Appellants attempted to show error at the hearing before the Commission by showing the value of the rolling stock actually in Missouri on January 1, 1965, and on subsequent dates throughout the year. Such evidence of course excludes any enhanced value resulting from the lease by N & W. After the hearing the Commission found that the tax was computed in accordance with the prescribed formula, and the evidence adduced by appellants did not show the valuation to be grossly excessive, or that it resulted in an unlawful or unconstitutional taxation of appellant's property, or that by applying the formula the Commission acted in an unlawful, unfair, improper, arbitrary or capricious manner (Jurisdictional Brief, p. 11a). Thus the findings of the Commission were not that the formula should blindly be followed, but that appellants had not presented evidence that constitu-

tionally would compel the Commission to use a different method of apportionment.

Appellants contend that the decision is contrary to those reached in **Fargo v. Hart**, 193 U.S. 490 (1904), **Union Tank Line Co. v. Wright**, supra, **Wallace v. Hines**, 253 U.S. 66 (1920), and **Southern Ry. Co. v. Kentucky**, 274 U.S. 76 (1927). In this case using the figure of $7,628,297 alleged by appellants to be the value of all units of its rolling stock actually in Missouri on January 1, 1965, the admitted assessed valuation of N & W properties in Missouri would be $18,500,757 as compared to the value set by the Commission of $31,298,939. Thus the amount in dispute is $12,798,182, a differential of approximately 37.7% of the entire assessment. Of course translated into taxes due, the amount would be much less. This does not compare with the "grossly excessive" valuation found in **Union Tank Line Co. v. Wright**, supra, wherein the taxable value was assessed at $291,196, as compared to an actual value of $47,310, almost six times as much. In **Nashville, C. & St. Louis Ry. v. Browning,** 310 U.S. 362 (1940), an assessment of $23,996,604.14 was upheld against the railroads figure of $16,021,296. In **Railway Express Agency, Inc. v. Virginia**, supra, the actual, unenhanced value of appellant's assets in Virginia was only .6% of its total assets while the apportionment made by Virginia upon gross receipts amounted to 1.7% of its gross receipts. Also, note the gross disparity between the valuations placed by the state and the taxpayer on the taxpayer's property in **Butler Brothers v. McColgan**, 315 U.S. 501 (1942). It is submitted that the decision in the Missouri court is not violative of the cases cited by appellants, but rather are in accordance with the cases cited herein and by the lower court.

The question appellants ask this Court to reexamine, and the criteria for such reexamination, were well stated in

Railway Express Agency, Inc. v. Virginia, supra, l.c. U.S. 458 as follows: " 'In basing its apportionment on mileage, the Tennessee Commission adopted a familiar and frequently sanctioned formula (Citations). Its asserted inapplicability to the particular situation is rested on petitioner's evidence as to the comparative revenue-producing capacity of its lines in and out of Tennessee. But both the Commission and the Supreme Court of the state thought that this evidence, however weighty, was insufficient to displace the relevance of the formula. **In a matter where exactness is concededly unobtainable and the feel of judgment so important a factor, we must be on guard less unwittingly; we displace the tax officials judgment with our own.** Certainly we cannot say that the combined judgment of Commission, Board and state courts is baseless.' " (Emphasis added)

Similarly appellants herein are asking this Court to review a decision of the Supreme Court of Missouri that evidence of value presented by appellants tending to show individual unit value was not sufficient to show that a statutory valuation based upon the apportionment of the value of an entire system resulted in an unconstitutional valuation. Appellees submit that it is evident that the Missouri courts considered the question herein raised in accordance with the proper constitutional guidelines of this Court, that the decision is in conformity with previous decisions made on the question, and the evidence submitted by appellants does not show that the assessment made is so grossly excessive as to be reexamined by this Court upon constitutional questions previously considered.

LACK OF SUBSTANTIAL QUESTION.

Appellants' arguments under the heading "THE QUESTIONS PRESENTED ARE SUBSTANTIAL" are not relevant to the question of substantiality but only reiterate arguments as to the merits of their case.

The decision of the Missouri Supreme Court is not contrary to any decisions of this Court, but was reached by an application of established principles of law to a fact situation peculiar to Norfolk & Western's method of operation. As stated by appellants in their Jurisdictional Statement, p. 17: "2. The Court below did not ignore these facts [the showing of the value of the average number of units physically present in Missouri during the year], but it completely discounted them apparently because of an odd misapplication of the so-called 'enhancement of value' theory." In effect, appellants are not saying that the court's decision is in conflict with the decisions of this Court on the questions presented, but in light of such decisions, the application was erroneous. Appellants are not asking this Court to consider a new principle of law or to prevent a violation of an established principle but to overrule an alleged misapplication of such principles to their situation.

The proper decision in this case, more so than most, turns upon its own facts. Its result will effect few if any other litigants. The question requires an interpretation of a state law, similar to other state laws which have been held to be constitutionally sound. Even if appellants would prevail, the law would not be changed, and appellants each year would be required to again prove a special fact situation requiring a different criteria for apportionment.

Appellants suggest that under the authority of **Central R.R. v. Pennsylvania**, supra, a domicilary state might attempt to tax the entire value of a carrier's fleet, other than the value attributable to units shown to be habitually present in a particular state and subject to taxation by it, resulting in a possible double taxation.

This Court did not hold in that case that a state could go behind the taxing statutes of another state and tax rolling

stock of a domiciled railroad which had been already taxed by another state on the theory that the tax imposed by the sister state was determined by a method other than the daily average units test. Such a conclusion would invalidate the use of any apportionment formula other than the number of units test even though the mileage formula has often been approved by this Court.

Factually, the approval of the thesis advanced by appellants would enable a railroad to avoid fall taxation of its rolling stock by requiring a state in which a lesser number of units would be physically present to abandon use of a mileage formula, as they seek by this action, but continue to be assessed by the same formula where the traffic density is greater. It is quite doubtful that if N & W's coal hauling operations were in Missouri that the Commission could depart from the statutory mileage formula and attempt to raise the assessment by use of the daily average number of units method.

CONCLUSION.

The decision below is predicated, not upon the constitutionality, but on the interpretation and application of a state taxing statute in the light of constitutional principles to a special fact situation peculiar to and affecting only the involved litigants. An examination of the decision shows that it was made after consideration of constitutional principles as announced by this and other Courts and represents no departure from these principles. The only argument raised against it questions the application of such principles.

Appellees submit that the decision below is in accordance with the decisions of this Court and the arguments raised by appellants are not sufficient to require a reexamination by this Court and therefore it is respectfully requested that the appeal be dismissed, or that the decision of the Supreme Court of Missouri be affirmed inasmuch as the questions presented are so unsubstantial as not to need further argument.

Respectfully submitted,

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